The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K351 OF 1979
ABDUL RAHMAN SEBLI JC
18 DECEMBER 2008

Civil Procedure — Injunction — Mareva injunction — Restraining second defendant from dealing with compensation sum for compulsory acquisition of land — Application to set aside — Whether disposal of suit by apex court extinguished plaintiffs' claim against defendants — Whether injunction superfluous as there was no longer any judgment sum to be satisfied in favour of plaintiffs — Whether application should be allowed

On 1 October 1976, the State Government of Sabah ('state government') compulsorily acquired the second defendant's land without offering any compensation. The second defendant filed an application against the state government to have the amount of compensation payable determined by the court. While the matter was pending, the plaintiffs' had, on 22 February 1979, commenced an action against the defendants ('Suit K351') alleging, inter alia, that the first defendant was guilty of a fraudulent and dishonest design and had acted in breach of his fiduciary duty as director and subsequently as a trustee of the first plaintiff. On 29 October 1996, the second defendant was awarded a sum of RM40,929,011 as compensation together with interest. This sum reflected the court's assessment of the value of the acquired land as at the date of acquisition. Following this judgment, the plaintiffs' applied for and obtained a Mareva injunction on 6 January 1997 restraining the second defendant from dealing with the compensation sum. The plaintiffs' had given an undertaking to pay damages to the defendants resulting from the injunction. In the meantime, on 6 September 1999, the plaintiffs' Suit No K351 was determined by the High Court where judgment was entered in favour of the plaintiffs'. The said decision was however, overturned on appeal by the Court of Appeal. An application for leave to appeal to the Federal Court was allowed. On 25 March 2008, the Federal Court by a unanimous decision affirmed the Court of Appeal's decision and dismissed the plaintiffs' appeal. In the meantime, based on the finding by the High Court that the first defendant had breached its fiduciary duties, the plaintiffs' had on 21 October 2008, some seven months after their appeal was dismissed by the Federal Court, commenced new proceedings against the defendants ('Suit K21') seeking a declaration as to the beneficial

ownership of the compensation sum. The defendants' present application for discharge and setting aside of the Mareva injunction was consequential upon the dismissal of that appeal. The defendants contended that the dismissal of the plaintiffs' appeal by the Federal Court completely extinguished the plaintiffs' claim against the defendants and rendered the Mareva injunction superfluous as there was no longer any judgment sum to be satisfied in favour of the plaintiffs'. They further contended that to allow the injunction to continue would be oppressive to the second defendant and was an abuse of process. The court was asked to determine the damages suffered by the defendants as a result of the injunction as they had been deprived of the compensation sum for more than 11 years now. The state government had refused to pay the compensation sum to the second defendant to this day because of the subsistence of the Mareva injunction. The plaintiffs' however, contended that the undertaking in the injunction should not be enforced until Suit K21 has been decided on its merits.

Held, allowing the defendants' application with costs:

(1) The parties' common position was that the injunction in respect of Suit K351 had lapsed on 6 September 1999, the date the trial ended. Thus, by 6 September 1999 the defendants were free to deal with the compensation sum notwithstanding that judgment was given in favour of the plaintiffs'. As for Suit K21 the plaintiffs' had not applied for any injunction to restrain the defendants from dealing with the compensation sum. Therefore, enforcement of the plaintiffs' undertaking has nothing to do with Suit K21 (see para 16).

(2) Since the injunction was only intended to cover the period between the date of the application and the trial of Suit K351 the injunction expired automatically at the end of the trial. Thus, at the expiry of the injunction on 6 September 1999, the plaintiffs' undertaking stood to be enforced if it could be shown that the defendants suffered damage as a result of the injunction, irrespective of the fact that judgment was given in the plaintiffs' favour. It was therefore untenable for the plaintiffs' to now argue that the right time to enforce their undertaking would be after the determination of Suit K21, which was filed 10 years after the expiry of the injunction (see para 19).

(3) The alleged breach of fiduciary duty on the part of the first defendant as alleged in Suit K21 had been dealt with by the Court of Appeal and the Federal Court. Both courts had extinguished the High Court's finding that the first defendant was in breach of his fiduciary duty. The Federal Court's decision effectively meant that the first defendant was

not in breach of his fiduciary duty as alleged by the plaintiffs in Suit K351 and now repeated in Suit K21. The issue was res judicata (see para 16).

(4) The plaintiffs could not be allowed to blow hot and cold, in one breadth saying that the injunction had lapsed and in the next saying that enforcement of their undertaking must wait. In the absence of a fresh injunction or stay of execution the defendants were entitled to the compensation sum as of right. It will be a travesty of justice if payment was further delayed and the plaintiffs' undertaking not enforced forthwith (see para 19).

[Bahasa Malaysia summary

Pada 1 Oktober 1976, Kerajaan Negeri Sabah ('kerajaan negeri'), memperoleh secara paksa tanah defendan kedua tanpa menawarkan apa-apa pampasan. Defendan kedua telah memfailkan satu permohonan terhadap kerajaan negeri untuk mendapatkan jumlah pampasan yang perlu dibayar yang ditentukan oleh mahkamah. Sementara tindakan masih belum selesai, plaintif telah pada 22 Februari 1979, memulakan satu tindakan terhadap defendan ('Guaman K351') menyatakan, antara lain, bahawa defendan pertama adalah bersalah dengan sengaja menipu dan tidak jujur dan telah bertindak melanggar tanggungjawab fidusiarinya sebagai pengarah dan seterusnya sebagai pemegang amanah plaintif pertama. Pada 29 Oktober 1996, defendan kedua telah diawardkan sejumlah RM40,929,011 sebagai pampasan beserta dengan faedah. Jumlah ini menggambarkan taksiran nilai tanah oleh mahkamah yang diperoleh setakat tarikh pemerolehan. Selepas penghakiman ini, plaintif telah memohon untuk dan telah mendapatkan injunksi Mareva pada 6 Januari 1997 yang menghalang defendan kedua daripada berurusan dengan jumlah pampasan. Plaintif telah memberikan akujanji untuk membayar ganti rugi kepada defendan-defendan akibat daripada injunksi tersebut. Sementara itu, pada 6 September 1999, Guaman No K351 plaintif telah diputuskan oleh Mahkamah Tinggi di mana penghakiman telah dimasukkan berpihak kepada plaintif. Keputusan tersebut walau bagaimanapun telah diubah semasa rayuan oleh Mahkamah Rayuan. Permohonan bagi kebenaran untuk merayu ke Mahkamah Persekutuan telah dibenarkan. Pada 25 Mac 2008, Mahkamah Persekutuan secara keputusan sebulat suara mengekalkan keputusan Mahkamah Rayuan dan menolak rayuan plaintif. Sementara itu, berdasarkan keputusan oleh Mahkamah Tinggi bahawa defendan pertama telah melanggar tanggungjawab fidusiarinya, plaintif telah pada 21 Oktober 2008, kira-kira tujuh bulan selepas rayuan mereka ditolak oleh Mahkamah Persekutuan, memulakan prosiding yang baru terhadap defendan ('Guaman K21') memohon untuk satu deklarasi sebagai pemilik benifisial jumlah pampasan. Permohonan defendan ini untuk melepaskan dan mengenepikan injunksi Mareva adalah

penting apabila rayuan ditolak. Defendan menegaskan bahawa, penolakan rayuan perayu oleh Mahkamah Persekutuan melenyapkan secara keseluruhannya tuntutan plaintif terhadap defendan-defendan dan menjadikan injunksi Mareva tidak diperlukan yang mana tidak ada lagi mana-mana jumlah penghakiman yang perlu dipenuhi bagi pihak plaintif. Selanjutnya mereka menegaskan bahawa untuk membenarkan injunksi tersebut diteruskan ia akan menindas defendan kedua dan adalah penyalahgunaan proses. Mahkamah diminta untuk menentukan ganti rugi yang ditanggung oleh defendan akibat daripada injunksi tersebut yang mana mereka telah dinafikan jumlah pampasan bagi lebih 11 tahun sekarang. Kerajaan negeri enggan membayar jumlah pampasan kepada defendan kedua hingga ke hari ini kerana kewujudan injunksi Mareva. Walau bagaimanapun, plaintif menegaskan bahawa akujanji di dalam injunksi tersebut seharusnya tidak dikuatkuasakan sehingga Guaman K21 telah diputuskan atas meritnya.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Pendirian bersama pihak-pihak adalah bahawa injunksi berkenaan Guaman K351 telah luput pada 6 September 1999, pada tarikh berakhirnya perbicaraan. Oleh itu, pada 6 September 1999 defendan adalah bebas untuk berurusan dengan jumlah pampasan meskipun penghakiman adalah diberikan berpihak kepada plaintif. Berkenaan dengan Guaman K21, plaintif tidak memohon untuk apa-apa injunksi untuk menghalang defendan daripada berurusan dengan jumlah pampasan. Oleh itu, penguatkuasaan akujanji plaintif adalah tidak berkenaan dengan Guaman K21 (lihat perenggan 16).

(2) Oleh kerana injunksi hanya bertujuan untuk meliputi tempoh di antara tarikh permohonan dan perbicaraan Guaman K351, injunksi tersebut telah luput secara automatik di akhir perbicaraan. Oleh itu, pada tarikh luputnya injunksi tersebut pada 6 September 1999, akujanji plaintif bermula untuk dikuatkuasakan jika ianya boleh ditunjukkan bahawa defendan menanggung kerugian akibat daripada injunksi tersebut, tanpa mengira fakta bahawa penghakiman telah diberikan berpihak kepada plaintif. Oleh itu tidak dapat dipertahankan oleh plaintif untuk sekarang ini mempertikaikan bahawa waktu yang sebenarnya untuk menguatkuasakan akujanji mereka seharusnya selepas penentuan Guaman K21, yang mana telah difailkan 10 tahun selepas luputnya injunksi tersebut (lihat perenggan19).

(3) Perlanggaran tanggungjawab fidusiari seperti yang didakwa bagi pihak defendan pertama seperti mana yang didakwa di dalam Guaman K21 telah diputuskan oleh Mahkamah Rayuan dan Mahkamah Persekutuan. Kedua-dua mahkamah telah melenyapkan keputusan Mahkamah Tinggi bahawa defendan pertama melanggar tanggungjawab

fidusiarinya. Keputusan Mahkamah Persekutuan secara efektifnya bermaksud bahawa defendan pertama tidak melanggar tanggungjawab fidusiarinya seperti mana yang didakwa oleh plaintif di dalam Guaman K351 dan sekarang diulang di dalam Guaman K21. Isu tersebut telah res judicata (lihat perenggan 16).

(4) Plaintif tidak boleh dibenarkan untuk berbelah bahagi, sekali menyatakan bahawa injunksi telah luput dan selepas itu menyatakan bahawa penguatkuasaan akujanji mereka mesti ditangguhkan. Dalam ketiadaan injunksi yang baru atau penggantungan perlaksanaan defendan adalah berhak kepada jumlah pampasan. Ianya adalah mempersendakan keadilan jika pembayaran ditangguhkan lagi dan akujanji plaintif tidak dikuatkuasakan dengan serta-merta (lihat perenggan 19).]

Notes

For cases on Mareva injunction, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3457–3534.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Aspatra Sdn Bhd & 21 Ors v Bank Bumiputera Malaysia Bhd & Anor [1988] 1 MLJ 97, SC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)

Mareva Compania Naviera SA v International Bulk Carriers SA [1975] 2 Lloyd's Rep 509, CA (refd)

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG [1984] 1 All ER 398, QBD (refd)

Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd [1984] 2 MLJ 143, HC (refd)

Z Ltd v A-Z and AA-LL [1982] QB 558, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 32 r 1, O 92 r 4

Sabah Limitation Ordinance (Cap 72) item 97 of the Schedule

Douglas Lind (Lind Willie Wong & Chin) for the defendants/applicants in summons dated 12 August 2008.

Martin Mann QC (Wilson Lai with him) for the plaintiffs/applicants in summons dated 22 October 2008.

Abdul Rahman Sebli JC:

[1] By a summons in chambers dated 12 August 2008 the defendants apply for the following orders:

(1) to discharge and set aside the injunction order dated 8 March 1997 obtained by the plaintiffs;

(2) that the plaintiffs shall pay to the defendants the costs occasioned by the plaintiff's application;

(3) that the plaintiffs shall pay such damages to the defendants resulting from the injunction order.

[2] The plaintiffs filed a summons in chambers of their own dated 22 October 2008 for the following reliefs:

(1) an order that the beneficial interests and/or entitlement of the plaintiffs and the defendants respectively in and/or to the judgment sum and interest awarded to the second defendant in Originating Summons No 69 of 1977 be determined as between the plaintiffs, the defendants and the Government of Sabah in the defendants' application (O 32 r 1) dated 12 August 2008 for the discharge of the injunction and for damages;

(2) an order joining the Government of Sabah as a party to the defendants' application.

[3] Since the issues raised in the two applications are interrelated they were heard together and shall be dealt with together in this judgment.

[4] To understand the context of the present applications it is necessary to state the factual background of the dispute between the plaintiffs and the defendants. The history of this case dates back to 1 October 1976 when the State Government of Sabah ('the government') compulsorily acquired the second defendant's land without offering any compensation. The second defendant had no choice but to file an originating summons ('OS No 69 of 1977') on 17 January 1977 against the government to have the amount of compensation payable determined by the court. The plaintiffs were not a party to that action. On 22 February 1979 the plaintiffs on their part commenced action against the defendants by way of Civil Suit No 351 of 1979 ('Suit K351'). In that action it was pleaded, inter alia, that the first defendant was guilty of a fraudulent and dishonest design and had acted in breach of his fiduciary duty as director and subsequently as a trustee of the first plaintiff. OS No 69 of 1977 came up for hearing before Justice Tee Ah Sing and two assessors in April 1996. At the conclusion of the trial the second defendant was awarded a sum of RM40,929,011 as compensation ('the compensation sum') together with interest at the rate of 6% per annum from 20 December 1976 until the date of payment. This sum reflects the court's assessment of the value of the acquired land as at the date of acquisition. The judgment was delivered on 29 October 1996. Following this judgment the plaintiffs applied for and obtained a Mareva injunction on 6 January 1997 restraining the second defendant from dealing with the compensation sum. The order of 6 January 1997 was later discharged and replaced by a

A subsequent order of 8 March 1997 extending the injunction to 27 March 1997. The order of 8 March 1997 is couched in the following terms:

> UPON THE APPLICATION of the parties AND UPON HEARING Alex Decena ESQ, and Junior Koh Siew Hui ESQ, of counsel for the 1st and 2nd Plaintiffs AND John Cherryman QC, Clement Allan Skinner ESQ, and Datuk Lawrence Thien Shin Hing, ESQ, of counsel for the 1st and 2nd Defendants AND UPON the 1st, 2nd and 3rd Plaintiffs by their Counsel undertaking to abide by any orders the Court or a Judge may make as to damages in case the Court or Judge shall hereafter be of opinion that the 1st and 2nd Defendants shall have sustained any by reason of this order which the 1st, 2nd and 3rd Plaintiffs ought to pay.
>
> BY CONSENT of the parties it is ORDERED THAT:
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> 1. The 1st and 2nd Defendants whether by themselves their servants or agents or otherwise howsoever, be restrained until further order from disposing of or charging or pledging or transferring or otherwise dealing or taking any step to assist in such disposing, charging, pledging, transferring or otherwise dealing or taking any step to assist in such disposing, charging, pledging, transferring or otherwise dealing with the full amount of compensation ('compensation monies') now payable and/or to be paid by the State Government of Sabah to the 2nd Defendants as applicants in Originating Summons No 69 of 1977 following the compulsory acquisition of the applicants' land held under Provisional Lease No 016290341 awarded by the court at RM40,929,011 together with interest thereon at 6% per annum from the 20th day of December 1976 until date of payment.
> 2. This Order replaces the Order made herein on 6th January 1997 (as continued) which is hereby discharged.
> 3. This Order continues until 27th March 1997 or as soon thereafter as Counsel can be heard when the Court will consider whether this Order should be continued until the trial of this action or be discharged.
> 4. That there be liberty to apply.
> 5. The costs of this application be reserved.

[5] The above order was varied through para 3 of another order dated 23 June 1997 the relevant parts of which read:

> (3) that the Order made herein on 8th March 1997 (which had the effect of extending in modified form the Order made ex parte herein on 6th January 1997) be varied by deleting paragraphs 3 and 4 thereof and substituting a new paragraph 3 in the following terms:

3 This Order continues until further order Provided that the Defendants or either of them shall be at liberty to apply for a date to be fixed when the court will consider the question (adjourned successively on 9th January, 1st February and 8th March 1997) whether this order should be continued until the trial of this action or discharged.

[6] The above 8 March 1997 order was subjected to another variation order of 13 March 2000 to allow for the release of RM3m from the injunction to enable the second defendant to pay legal and other fees using the compensation sum. Suit K351 finally came up for hearing before Justice Ian Chin on 13 April 1999, twenty years after it was filed. At the conclusion of the trial on 6 September 1999 the learned trial judge found in favour of the plaintiffs and awarded the plaintiffs a sum of RM10,375,504 together with interest at the rate of 6% pa from 20 December 1976 to the date of judgment and 8% pa from the date of judgment to the date of realisation. The defendants appealed against that decision. On 6 June 2003 the Court of Appeal allowed the defendant's appeal and set aside the whole judgment of the High Court. The plaintiffs filed a notice of motion for leave to appeal to the Federal Court against the Court of Appeal's decision and leave was granted on 21 March 2007. The Federal Court on 25 March 2008 in a unanimous decision affirmed the Court of Appeal's decision and dismissed the plaintiff's appeal. Suit K351 in respect of which the injunction was issued had therefore been finally determined by the highest court in the land.

[7] The defendants' present application for discharge and setting aside of the Mareva injunction is consequential upon the dismissal of that appeal. The defendants say that the dismissal of the plaintiffs' appeal by the Federal Court completely extinguished the plaintiffs' claim against the defendants and rendered the Mareva injunction superfluous as there is no longer any judgment sum to be satisfied in favour of the plaintiffs. It was further submitted that to allow the injunction to continue would be oppressive to the second defendant and is an abuse of process. The defendants submitted that it will only be just that an enquiry be held by this court to determine the damages suffered by the defendants as a result of the injunction as they have been deprived of the compensation sum for more than 11 years now. Indeed it is not disputed by the government that they have refused to pay the compensation sum to the second defendant to this day, citing the subsistence of the Mareva injunction as a reason. From the defendants' point of view therefore it is necessary to have the injunction removed forthwith and damages assessed by the court.

[8] Perhaps it is appropriate at this juncture to mention that at the trial of Suit K351 Justice Ian Chin made the following finding of fact — that

A unknown to the plaintiffs at that time the first defendant in his capacity both as director of the first plaintiff and managing director of the second defendant had between 1974 and 1976 unlawfully deprived the first plaintiff of the opportunity to exploit and receive the proceeds of the exploitation of forest land within an area covered by a special timber licence which the first B defendant obtained from the government. This according to the learned judge constituted a breach of fiduciary duty on the part of the first defendant. It was on the basis of that finding that the plaintiffs on 21 October 2008, seven months after their appeal was dismissed by the Federal Court, C commenced new proceedings against the defendants in Suit No K21–27 of 2008 ('Suit K21') asking for a declaration as to the beneficial ownership of the compensation sum. In that action the plaintiffs plead, inter alia, that they are entitled to the compensation sum which they say is held by the government as constructive trustee for them and the second defendant D according to their respective interests therein. The plaintiffs therefore want their beneficial interest or entitlement to the compensation sum to be determined first before the issue of damages resulting from the injunction is dealt with by this court. For the same reason the plaintiffs contend that the government ought to be joined as a party to the defendants' application. E Learned counsel for the government has indicated that the government has no objection to being made a party to the action but made it clear that the government does not wish to be involved in argument and will abide by whatever order the court may give. He said the government's position is that it is bound to pay the compensation sum to the second defendant. In my F view the government cannot be adopting a contrary position since they are bound to obey the court order of 29 October 1996 subject to any procedural law relating to disbursement.

G **[9]** In *Z Ltd v A-Z and AA-LL* [1982] QB 558 it was held that a third party who holds the defendant's assets is bound by the Mareva injunction once he has notice of it. But of course in that case, unlike the position of the government in the present case the party holding the defendant's assets was not under any court order to pay any sum in satisfaction of a judgment. As H the compensation sum has not been paid over to the second defendant by the government the injunction has in fact not bitten.

[10] Learned counsel for the plaintiffs strenuously argued that this court should not exercise its discretion to enforce the plaintiffs' undertaking in the I injunction until Suit K21 has been decided on its merits or, in the alternative, the issues raised in that action have been determined by this court, in consonance with the principle that the court will not enforce an undertaking if, after taking all the circumstances into account, the circumstances are special enough to render it unjust to do so. Reference was made to Gee,

Commercial Injunctions (2004, 5th Ed), para 11.023–025. The plaintiffs' undertaking it will be recalled is as follows:

> ... to abide by any order the court or a judge may make as to damages in case the court or judge shall hereafter be of opinion that the first and second defendants shall have sustained any by reason of this order which the first, second and third plaintiffs ought to pay.

[11] It was contended that this is not the right time to enforce the plaintiffs' undertaking as Suit K21 has yet to be tried and that the outcome of that suit will have a bearing on the disbursement of the compensation sum. According to learned counsel the plaintiffs are entitled to substantially the whole, if not actually the whole of the compensation sum due to the breach of fiduciary duty by the first defendant. Learned counsel says the defendants have contested this issue hook, line and sinker, whatever that may mean. The plaintiffs further contended that being a constructive trustee for the compensation sum the government will be liable to the plaintiffs should it pay the compensation sum away to the second defendant and the issues in Suit K21 are eventually determined in favour of the plaintiffs. It was pointed out that the second defendant has not adduced any evidence of loss and damage resulting from the injunction. In the circumstances it was submitted in the alternative that there is no need for an enquiry as there is nothing to assess.

[12] The defendants' answer to the plaintiffs' objection is that the grounds raised by the plaintiffs are irrelevant, misconceived, baseless and without merit for the following reasons:

(i) the Mareva injunction had lapsed as it has no life beyond the trial of the action;

(ii) the plaintiffs' objection is grounded on a totally different and separate cause of action;

(iii) the proposed claim involve different parties and therefore the plaintiffs in that action have no locus standi to raise any objection to the defendants' present application;

(iv) the plaintiffs' action in Suit K21 is time barred by virtue of item 97 of the Schedule to the Limitation Ordinance Cap 72;

(v) the plaintiffs' claim, based as it is on the gross proceed or profit, is res judicata as the issue had been fully adjudicated by the Court of Appeal and the Federal Court; and

(vi) the plaintiffs' objection is not bona fide as they have given two inconsistent grounds of objection in that in their written submissions dated 3 March 2004 the ground given for objecting to a variation of the

injunction was that they needed protection up to a sum of RM124m in the event they succeeded in their appeal in the Banita suit but now, in objecting to an application for discharge of the injunction the reason given is that they are entitled to a lion share of the compensation sum.

[13] With regard to the plaintiffs' application to enjoin the government in this application, the defendants submitted that it is too late in the day to do so, citing *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 in support.

[14] The Mareva injunction has its origin in *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 509. The purpose of a Mareva injunction is to restraint a defendant from dissipating assets pending the trial of the action thereby preventing the risk that a judgment given in the plaintiff's favour would remain unsatisfied: see *Halsburys Laws of Malaysia,* Vol 1, para 10.5; see also *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398. In *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 Edgar Joseph Jr J (as he then was) held that the court could exercise its inherent powers under O 92 r 4 of the Rules of the High Court 1980 to grant Mareva injunctions in Malaysia. This view was endorsed by Azmi SCJ sitting in the then Supreme Court in *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputera Malaysia Bhd & Anor* [1988] 1 MLJ 97.

[15] The purpose of the injunction order issued on 8 March 1997 was to satisfy the plaintiffs' claim in Suit K351 in the event they succeeded against the defendants in that suit. If they failed the question of satisfying their claim would not arise. In that event their undertaking to pay damages to the defendants resulting form the injunction would be liable to be enforced. But they did not fail in the first instance. It was in the Court of Appeal and subsequently in the Federal Court that their claim was thrown out. The plaintiffs' objection to the defendants' application for discharge of the injunction and assessment of damages is twofold. First, since the injunction had automatically expired on 6 September 1999 when Suit K351 was concluded there is no existent order to be discharged. Secondly, as adverted to earlier the court should only exercise its discretion to enforce the undertaking after Suit K21 has been determined on its merits. It was submitted that the plaintiffs' new action in Suit K21 discloses a good cause of action, well founded in law and with reasonable prospect of success and that if the plaintiffs were to succeed the second defendant's interest or entitlement in the compensation sum would be small compared to the plaintiffs' entitlement. According to the plaintiffs they are entitled to a lion share of the compensation sum. Since the injunction expired on 6 September 1999 it was the plaintiffs' contention that the relevant period for the purpose

of assessment of damages is the period from 8 March 1997 to 6 September 1999 and not beyond. The implication is that the amount of damages the plaintiffs may be ordered to pay to the defendants resulting from the injunction will be significantly less.

[16] The question is whether it is necessary to hear Suit K21 on its merits before this court can exercise its discretion to enforce the plaintiffs' undertaking. This depends on whether there is any connection between Suit K351 and Suit K21 in so far as the injunction is concerned. In my view there is none whatsoever. It must be pointed out at the outset that the parties' common position is that the injunction in respect of Suit K351 had lapsed on 6 September 1999, the date the trial ended. Thus by 6 September 1999 the defendants were free to deal with the compensation sum notwithstanding that judgment was given in favour of the plaintiffs. As for Suit K21 the plaintiffs have not applied for any injunction to restrain the defendants from dealing with the compensation sum. Therefore enforcement of the plaintiffs' undertaking has nothing to do with Suit K21. The plaintiffs however say that the issue of breach of fiduciary duty on the part of the first defendant is inextricably linked to their claim to the compensation sum and that therefore the issues raised in Suit K21 ought to be determined by this court first before dealing with assessment of damages. What the plaintiffs are attempting to do is to link Suit K21 with the High Court's finding in Suit K351 that the first defendant was in breach of his fiduciary duty. This they cannot do because the alleged breach of fiduciary duty on the part of the first defendant as pleaded in para 18 of Suit K21 had been dealt with by the Court of Appeal and the Federal Court. Both courts have extinguished the High Court's finding that the first defendant was in breach of his fiduciary duty. The Federal Court's decision effectively means that the first defendant was not in breach of his fiduciary duty as alleged by the plaintiffs in Suit K351 and now repeated in Suit K21. The issue is res judicata. On what res judicata means Peh Swee Chin FCJ had the following to say in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 197:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicata. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata provitate accipitur*. The public policy of the law is that, it is in the public interest that there shall be finality in litigation.

[17] The relevant part of the Federal Court's judgment on the issue of breach of fiduciary duty reads as follows:

A As to the question of whether DSK had been disloyal to his principal, we are of the view the Court of Appeal had not made any error of law in its decision in finding that DSK did not commit any breaches of fiduciary duty. We agree with the findings of the Court of Appeal that the learned trial judge was wrong in concluding that DSK had committed a breach of fiduciary duty.

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[18] 'DSK' in the above passage is a reference to the first defendant. Clearly the Federal Court's decision put to rest all issues raised in Suit K351 and this included the issue of breach of fiduciary duty. To revive the issue now in a new action and use it as both shield and sword in the present applications is C a clear attempt to circumvent the Federal Court's decision and is an abuse of the court process. Even if I am wrong on this point I am of the view that the issue of whether the first defendant was in breach of his fiduciary duty in Suit K21 is irrelevant in considering whether the plaintiffs' undertaking in Suit K351 should be enforced, now that the injunction had expired.

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[19] The next question is whether it is necessary for the court to discharge an injunction that had lapsed. Mr Martin Mann for the plaintiffs says that there is nothing to discharge. I agree. Since the injunction was only intended E to cover the period between the date of the application and the trial of Suit K351 the injunction expired automatically at the end of the trial. A discharge order is only necessary if there is an existing order to be discharged. The appeal and cross appeal to the Court of Appeal and subsequently to the Federal Court does not change the status of the injunction. Thus at the expiry F of the injunction on 6 September 1999 the plaintiffs' undertaking stood to be enforced if it could be shown that the defendants suffered damage as a result of the injunction, irrespective of the fact that judgment was given in the plaintiffs' favour. It is therefore untenable for the plaintiffs to now argue that the right time to enforce their undertaking would be after the determination G of Suit K21, which was filed 10 years after the expiry of the injunction. The plaintiffs cannot be allowed to blow hot and cold, in one breadth saying that the injunction had lapsed and in the next saying that enforcement of their undertaking must wait. In the absence of a fresh injunction or stay of execution the defendants are entitled to the compensation sum as of right. It H will be a travesty of justice if payment is further delayed and the plaintiffs' undertaking not enforced forthwith.

[20] For reasons stated above the defendants' application is allowed in terms of prayers (2) and (3) of the summons in chambers dated 12 August I 2008. Costs to the defendants. The plaintiffs' summons in chambers dated 22

October 2008 is dismissed with costs. Damages resulting from the injunction, if any, is to be assessed by the deputy registrar.

Defendants' application allowed with costs.

Reported by Ashgar Ali Ali Mohamed